

<sup>1</sup> Award at 11 (entered Dec. 10, 2007).

disability, or that she is permanently and totally disabled from work. Respondent argues that claimant should be limited to a functional impairment for her left knee and low back, but denied any impairment for claimant's alleged personality disorders.

2. What is the maximum award if claimant's award is for functional impairment only? The parties agree that claimant would be limited to a \$50,000.00 cap if her award is limited to a functional impairment under K.S.A. 44-510f(a)(4). However, the parties do not agree as to whether claimant is limited to only one \$50,000.00 cap or whether a separate cap would be proper for a scheduled injury under K.S.A. 44-510d and a second cap under K.S.A. 44-510e for a whole body functional impairment if claimant's injuries extend to both the scheduled injury and whole body areas of her anatomy.

#### **FINDINGS OF FACT**

Claimant became employed by respondent in 2000 to stock and work as a cashier. On November 8, 2001, while working, claimant slipped and fell, striking her head on the corner of a counter and injuring her head, left knee and upper back. Claimant's fall was witnessed by a customer in respondent's store. After the fall, claimant experienced head pain and swelling in her head and jaw, and both knees were swollen and her jaw was black and blue. Claimant was not immediately referred for treatment, but ultimately came under the care of Bradley A. Breeden, D.O. Dr. Breeden treated claimant with medication and osteopathic manipulation of her back, hips and legs. Claimant was referred to Thomas P. Phillips, M.D., who diagnosed claimant with a medial meniscus tear, with chondromalacia and degenerative osteoarthritis of the left knee.<sup>2</sup> Claimant underwent a left knee arthroscopy by Dr. Phillips.<sup>3</sup> A few weeks after the fall, claimant was terminated from her employment for what was described as an "inappropriate usage of coupons."<sup>4</sup>

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<sup>2</sup> P.H. Trans. (July 24, 2003), Resp. Ex. C.

<sup>3</sup> K.S.A. 44-534a allows for the introduction of medical exhibits at preliminary hearing without the accompanying testimony of the creators of those medical reports. K.A.R. 51-3-5a restricts the use of those reports at the time of the regular hearing unless the reports are stipulated to or supported by later testimony of the physician, surgeon, or other person making the report. Here, both claimant and respondent submitted submission briefs and addendums to their submission briefs listing the medical exhibits attached to the preliminary hearings as being part of the record. The Board considers this to constitute a stipulation to include these preliminary hearing exhibits in this record. Therefore, the medical reports and other exhibits attached to the preliminary hearings in this matter have been considered as part of the record in the Board's determination of this award.

<sup>4</sup> P.H. Trans. (July 24, 2003), Resp. Ex. B.

After claimant's fall, in addition to the pain in her head, back and knees, claimant began experiencing pain in multiple areas of her body. Claimant began experiencing chronic daily headaches, temporomandibular joint disorder (TMJ), ear pain, cognitive dysfunction, memory problems, urinary frequency and depression. Claimant was evaluated by Jeffrey Wald, M.D., for the ear pain, which he attributed to claimant's TMJ. Michael F. Hughes, M.D., opined that claimant's ear discomfort is secondary to the TMJ and to post-concussion syndrome.

Claimant has been evaluated by numerous neurologists, medical physicians, osteopathic physicians, neuropsychologists and clinical psychologists. Neurologist Ian L. Belson, D.O., treated claimant for post-traumatic headaches, with his first examination occurring in December 2001. Dr. Belson expressed significant frustration with his inability to find a combination of medications to adequately control claimant's pain and disability. He ultimately determined that claimant's headaches, which he described as "intractable,"<sup>5</sup> would limit her ability to function and would make her an unreliable and inefficient employee. The medical reports indicate claimant's headaches are inconsistent, but many reports discuss claimant having headaches, sometimes occurring three to four times per week.

Claimant, on a referral from respondent's claims specialist, came under the care of neurologist Michael E. Ryan, M.D. Dr. Ryan first examined claimant on September 24, 2002. He diagnosed claimant with a closed head injury without loss of consciousness, but opined claimant had probably suffered from a concussion. Claimant was referred for neuropsychometric testing with neuropsychologist William T. Blessing, Ph.D. The tests indicated claimant's post-concussive problems had resolved. However, Dr. Ryan was concerned that some other process was at play with claimant. He discussed a possible psychological condition as possibly exacerbating or causing her problem. Dr. Blessing also noted claimant's good resolution to her post-concussion syndrome, but expressed concern with invalid results from the psychological assessment. He went on to note that a psychological condition could be underlying or exacerbating claimant's condition.

Claimant came under the care of neurologist Christine M. Boutwell, M.D. Dr. Boutwell examined claimant for her chronic headaches, cognitive dysfunction and possible components of stress, depression and anxiety. Claimant was referred by Dr. Boutwell to psychologist Kathleen Keenan, Ph.D. Dr. Keenan diagnosed claimant with an adjustment disorder with mixed anxiety and depressed mood and pain disorder associated with both psychological factors and claimant's general medical condition. She opined that claimant's fall on November 8, 2001, caused or contributed to those findings. Dr. Keenan also noted significant family issues associated with claimant's ongoing problems. Claimant's ongoing power struggle with her husband played a big part in

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<sup>5</sup> P.H. Trans. (July 24, 2003), Cl. Ex. 4.

claimant's not being able to move forward. Dr. Keenan recommended a joint meeting with claimant and her husband, but was initially met with resistance. When the meeting did finally occur on January 17, 2005, it was not productive, and claimant's treatment ended at that point. Dr. Keenan opined that claimant and her husband appeared disinterested in any further progress. Dr. Keenan ultimately determined that claimant's problems were primarily related to a personality disorder which Dr. Keenan did not believe was caused by claimant's on-the-job injury. She agreed that stressors such as an injury can aggravate an underlying personality disorder, but felt claimant's family issues were her primary stressors. She felt it would be good for claimant to return to work and stated claimant is capable of working if the motivation was there. Dr. Keenan did state, in her evaluation report of January 23, 2004, that claimant appeared to be "caught in a vicious cycle of physical symptoms causing her anxiety, and anxiety leading to more physical symptoms."<sup>6</sup>

Claimant was referred to neuro and rehabilitation psychologist Leif Eric Leaf, Ph.D. The referral was by a physician, but Dr. Leaf was unable to identify that person. He first examined claimant on April 4, 2005, diagnosing an adjustment disorder secondary to traumatic brain injury. Claimant also had a cognitive disorder from the brain injury which affected her ability to follow through and maintain cognitive and adaptive skills necessary to maintain employment. Claimant was markedly impaired as to attention and concentration, and Dr. Leaf opined that claimant may be able to do a job for a while but she would not be able to maintain it over time. He noted this was a hallmark of a traumatic brain injury. Dr. Leaf reviewed claimant's general adaptive functioning (GAF) score of 50. He testified that this denotes serious impairment. He determined that, originally, claimant was working, had a family that was supportive of her and she was supportive of her daughters. After the injury, these relationships took a significant change or experienced a significant decline. Dr. Leaf's history is somewhat suspect as he was told that claimant was unconscious for a time, and this aspect of claimant's history is not supported by this record. He still determined that claimant's difficulties with her daughters were due, to a significant degree, to the accident. Dr. Keenan disagreed with this conclusion. She noted that supportive families do not fall apart and become dysfunctional this quickly.

Dr. Leaf determined that claimant was moderately severely impaired. Pursuant to the second edition of the *AMA Guides*,<sup>7</sup> he determined that claimant was impaired with a range of between 55 percent and 75 percent, with claimant being closer to the high end of the rating range. He did not believe claimant was malingering. Dr. Leaf felt claimant had serious cognitive and personality changes secondary to her accident. Claimant's physical impairment would be considered mild. Her social functioning loss was considered moderate. But claimant's concentration had suffered a marked impairment.

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<sup>6</sup> Keenan Depo., Resp. Ex. B.

<sup>7</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed.).

These difficulties were related to the traumatic brain injury suffered at the time of the accident.

Claimant was referred by her attorney to board certified occupational and preventive medicine expert Michael J. Poppa, D.O., on March 30, 2006. Dr. Poppa diagnosed claimant with post-concussive syndrome manifesting itself with headaches and complaints. Claimant also had chronic cervical strain, chronic thoracic strain and chronic myofascitis. She also had chondromalacia and was post knee surgery in the left knee. Dr. Poppa related these conditions to claimant's November 8, 2001 accident. He assessed claimant with a 9 percent permanent partial impairment to the left lower extremity which converted to a 3 percent whole person impairment, a 5 percent whole person impairment for the chronic strain of the cervical spine, a 5 percent whole person impairment for the chronic strain of her thoracic spine, a 5 percent whole person impairment for the chronic myofascitis, and a 30 percent whole person impairment for the head/cognitive condition. His ratings were pursuant to the fourth edition of the *AMA Guides*.<sup>8</sup> Using the combined values chart, Dr. Poppa computed an overall 42 percent permanent partial whole person impairment. He determined that claimant was realistically unemployable. He did not believe any ordinary employer would be expected to hire claimant. When provided a task list created by vocational expert Dick Santner, Dr. Poppa determined claimant was unable to perform 19 of the 22 tasks for an 86 percent task loss.

Claimant was referred by respondent's attorney to board certified physical medicine and rehabilitation specialist Steven L. Hendler, M.D., on November 7, 2006. Dr. Hendler found claimant to have physical complaints consistent with claimant's left knee injury. His examination did not uncover any physical findings to support claimant's allegations of a back injury or anything consistent with the type of head injury claimant reported. Dr. Hendler tested claimant for orientation and short-term memory, and performed serial seven testing and assessment of language. Serial seven testing is where a patient begins with the number 100 and is asked to count backward subtracting 7 each time. Dr. Hendler opined that with the mild head injury suffered by claimant with minimal to no loss of consciousness, he would not expect the significant memory loss displayed by claimant. He diagnosed both financial secondary gain and emotional secondary gain were involved. He assessed claimant a 2 percent permanent partial impairment to the lower left extremity for the injuries to claimant's knee. He rated claimant at zero percent for both the back injury and for the cognitive impairment alleged. Dr. Hendler was presented with a task list prepared by vocational expert Terry Cordray and determined claimant was unable to perform 1 of the 18 tasks on the list for a 5.6 percent loss of task performing ability. He acknowledged that he did no psychological testing on claimant, only physical testing.

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<sup>8</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>9</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>10</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>11</sup>

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.<sup>12</sup>

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.<sup>13</sup>

The events surrounding claimant's fall are relatively undisputed. The results of that fall have been and remain in significant dispute. Claimant alleges a knee injury, a low back injury, and significant psychological and cognitive difficulties from this fall. The medical testimony is severely divided, with Dr. Poppa finding claimant severely impaired with a 42 percent whole body disability and little chance of claimant finding employment. Dr. Hendler, on the other hand, appears to find claimant's complaints to be at the very least unexplained and potentially fabricated. The Board, in reviewing the total record with a multitude of health care providers involved, finds the opinion of Dr. Poppa to be more convincing. Claimant has been subjected to a plethora of medical tests. The Board is persuaded by the medical tests that claimant has suffered injuries to her cervical spine, her thoracic spine and her left knee, and that she has significant cognitive difficulties resulting from the accident of November 8, 2001.

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<sup>9</sup> K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

<sup>10</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>11</sup> K.S.A. 44-501(a).

<sup>12</sup> *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

<sup>13</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

The psychologists who testified in this matter are not as far apart. Both Dr. Leaf and Dr. Keenan found claimant to have significant cognitive difficulties and both agree the accident had an adverse effect on those psychological conditions. The dispute here exists as to whether claimant's psychological, cognitive and family problems are the result of the accident, and whether those psychological difficulties are contributing to claimant's ongoing physical complaints.

The ALJ found the opinion of Dr. Leaf to be the more persuasive, and the Board agrees. Claimant suffered a cognitive disorder secondary to the injury to her brain. As the direct result of those injuries, claimant is severely impaired in her ability to concentrate. This directly affects claimant's ability to react socially with members of her family and with members of the public in general.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>14</sup>

In considering the opinions of both Dr. Poppa and Dr. Leaf, the Board finds claimant has suffered a 3 percent whole person impairment for the injuries to her left knee, a 5 percent whole person impairment for the cervical strain and a 5 percent whole person impairment for the thoracic strain. This combines for a 13 percent permanent partial disability to the whole body. In considering the impairment for claimant's cognitive impairment, the Board finds the opinion of Dr. Leaf to be the most persuasive. As Dr. Leaf gave a range of between 55 and 75 percent, the Board finds claimant's cognitive rating to be a 65 percent permanent partial disability to the whole body. In combining both the physical and cognitive ratings, claimant is awarded a 70 percent permanent partial disability to the whole body on a functional basis.

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.<sup>15</sup>

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<sup>14</sup> K.S.A. 44-510e(a).

<sup>15</sup> K.S.A. 44-510c(a)(2).

As set forth in *Love*,<sup>16</sup> the following three elements must be met for a traumatic neurosis claim to be compensable:

1. A physical injury;
2. Symptoms of traumatic neurosis; and
3. These symptoms are directly traceable to the physical injury.<sup>17</sup>

The Board further finds that claimant has been rendered permanently and totally disabled. The opinions of Dr. Leaf and Dr. Poppa are persuasive that claimant, while perhaps able to obtain a job, would be unable to hold that job. Therefore, the Award of the ALJ is modified to find claimant is realistically unemployable and, thus, permanently and totally disabled.

#### CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find claimant is permanently and totally disabled as the result of the injuries suffered on November 8, 2001.

#### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 10, 2007, should be, and is hereby, modified to find claimant is permanently and totally disabled as the result of the injuries suffered on November 8, 2001.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Myra Lynn Gansert, and against the respondent, Hy Vee Food Stores, Inc, and its insurance carrier, Fidelity & Guaranty Insurance Company, for an accidental injury which occurred on November 8, 2001, and based upon an average weekly wage of \$463.20.

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<sup>16</sup> *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557 (1989).

<sup>17</sup> *Id.* at 398.



Claimant is entitled to 100.86 weeks of temporary total disability compensation at the rate of \$308.82 per week totaling \$31,147.59, followed by permanent total disability compensation at the rate of \$308.82 per week not to exceed \$125,000.00 for a permanent total general body disability.

As of April 28, 2008, there would be due and owing to claimant 100.86 weeks of temporary total disability compensation at the rate of \$308.82 per week in the sum of \$31,147.59, plus 236.71 weeks of permanent total disability compensation at the rate of \$308.82 per week in the sum of \$73,100.78, for a total due and owing of \$104,248.37, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$20,751.63 shall be paid at \$308.82 per week until fully paid or until further order of the Director.

K.S.A. 44-536(h) states:

Any and all disputes regarding attorney fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the attorney fees, or a division of attorney fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorney fees or contracts for attorney fees, shall be heard and determined by the administrative law judge, after reasonable notice to all interested parties and attorneys.

Claimant's former attorney, Dennis L. Horner, has filed a lien in this matter. The ALJ made no determination regarding this lien. Any division of the award between claimant and her current attorney is subject to said lien. The attorneys shall present this matter to the ALJ for a determination as to the division of attorney fees.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jon K. Lowe, Attorney for Claimant  
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge